

April 30, 2021

Freedom of Information Act Request

National FOIA Office
U.S. Environmental Protection Agency
Mail Code 2310A
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20640

CC: Justina Fugh
Senior Counsel for Ethics
U.S. Environmental Protection Agency
Mail Code 2311A
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Ethics Office -- Recusal memos and communications related to Melissa Hoffer

Dear FOIA Officer,

On behalf of Energy Policy Advocates (“EPA”), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, please provide copies of the records as described herein.

Records Requested

EPA requests the following records from the U.S. Environmental Protection Agency’s (“USEPA”) Ethics Office located within the Office of General Counsel:

1. *All memoranda or documents produced by or received by employees within the Ethics Office or Office of General Counsel pertaining or relating to Melissa Hoffer.* This request includes, but is not limited to, any final memoranda developed for the purpose of outlining recusal obligations, potential conflicts of interest that might involve Ms. Hoffer’s former employer, its clients, members or partners, and any particular matters that have been identified, as well as any waivers issued by agency ethics officials.
2. This request also includes but again is not limited to *any and all* communications, including written analysis in any form, by and to officials in the Ethics Office regarding actual or possible meeting requests with non-governmental entities involving Ms. Hoffer. If any requested records were produced prior to the official start date of Ms. Hoffer those should also be included.

3. This request also includes, but is not limited to, all other communications between Ms. Hoffer and employees within the Ethics Office and/or Office of General Counsel pertaining or relating to the drafting and revision of any ethics or recusal letter, any memoranda or other documents pertaining or relating to Ms. Hoffer's actual or possible recusal obligations. That is, this request covers those communications that were part of the development of Ms. Hoffer's ethics or recusal letter, which are related to the recusal obligations, potential conflicts of interest that might involve Ms. Hoffer's former employer, its clients, members or partners, and any particular matters that have been identified, as well as any waivers issued by agency ethics officials. If any requested records were produced prior to the official start date of Ms. Hoffer, those should also be included.

For this request, the term "all records" refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, text, SMS, Telegram, Signal, WhatsApp or other instant messages, letters, notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, digital logs such as those produced by Microsoft Teams (including Teams file folders or collaborative work documents housed in Teams), papers published, and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records.

This request is not meant to exclude any other record(s) or part(s) thereof that, although not specifically requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, recipients, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements

will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you should seek to withhold or redact any responsive records or parts thereof, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

EPA is willing to receive records on a rolling basis.

Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, *e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B).

We seek responsive records in their native form, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.¹ The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, “Electronic files must be produced in their native format, *i.e.*, the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. (***Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.***)” (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is

¹ <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.

associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We appreciate the inclusion of an index.

Fee Waiver Request

Our request for fee waiver is in the alternative, first for reasons of significant public interest, and second, on the basis of the Energy Policy Advocates' status as a media outlet. The Agency must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as EPA access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. EPA Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). The Environmental Protection Agency FOIA regulations at 40 C.F.R. § 2.107(l) establish the same standard.

First, as explained herein, the federal government acknowledges EPA's status as a media requester. Further, in the alternative thus, the Agency must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons

interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 40 C.F.R. § 2.107(l). As shown below, EPA meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the Agency. This request asks for: all memoranda or documents produced by or received by employees within the Ethics Office relating to Ms. Hoffer as further detailed, *supra*. This request includes, but is not limited to, any final memoranda developed for the purpose of outlining recusal obligations, potential conflicts of interest that might involve her former employer, their clients or members, and any particular matters that have been identified, as well as any waivers issued by agency ethics officials. This request also includes any and all communications, including written analysis in any form, by and to officials in the ethics office regarding meeting requests with non-governmental entities involving Ms. Hoffer. If any requested records were produced prior to the official start date of Ms. Hoffer, those should also be included.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

As described, above, the requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow EPA to convey to the public information about whether officials such as Ms. Hoffer, who is charged with formulating and assisting in policy and executing the duties of office, is acting consistently with all of the laws, rules, and regulations that govern the actions and activities of a high-ranking and non-career government official. After disclosing records relating to the ethics obligations of Ms. Hoffer, EPA will inform the public about the ethics obligations and actions of Ms. Hoffer in order to ensure decisions that are being made consistent with the law. Once the information is made available, EPA will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of Environmental Protection Agency operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of the Ethics Obligations of a Non-Career Appointee at the Environmental Protection Agency.

For reasons already described, the requested records will contribute to public understanding of the ethics advice provided by career officials, in order to help ensure future actions, decisions, and deliberations of non-career appointees are conducted in a compliant manner. As explained above, the records will contribute to public understanding of this topic.

Ethics obligations exist to reduce the likelihood that senior government officials are making decisions in a biased or arbitrary manner or to benefit the interests of former employers, clients or related parties. Ensuring the avoidance of conflicts of interest or the appearance of bias is of interest to a reasonably broad segment of the public. EPA will use the information it obtains from the disclosed records to educate the public at large about what obligations have been identified for those individuals making the Agency's important decisions. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through EPA's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the integrity of actions the Agency has been involved in since the new Administration took over. We are also unaware of any previous release to the public of these or similar records. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...."

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of what obligations senior officials such as Ms. Hoffer have and whether they are able to compliantly participate in the many activities in which their official position may otherwise be expected to participate in. The public is always well served when it knows how the government conducts its activities, particularly matters touching on ethics questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the potential conflicts of interest and recusal obligations of non-career appointees such as Ms. Hoffer at the Agency.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

EPA is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the potential conflicts of interest and likelihood of an appearance of bias in decision-making as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on the Agency's compliance with its own mission and responsibility to protect our nation's environment. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, EPA meets this factor as well.

II. EPA has the Ability to Disseminate the Requested Information Broadly.

EPA is dedicated to obtaining and disseminating information relating to energy and environmental public policy. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates what obligations exist for senior government officials. EPA has both the intent and the ability to convey any information obtained through this request to the public. Energy Policy Advocates publishes its findings regularly through the organization's website, www.epadvocates.org. This work is frequently cited in newspapers and trade and political publications.² EPA intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms.

Through these means, EPA will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that EPA possesses the expertise to explain the requested information to the public; (4) that EPA possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes EPA as a reliable source in the field of government officials' conduct.

Public oversight and enhanced understanding of the Agency's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). EPA need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for EPA to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Requester.

² See, e.g., recent coverage at Editorial, *Wall Street Journal*, "Biden's 'BackDoor' Climate Plan," March 17, 2021, <https://www.wsj.com/articles/bidens-backdoor-climate-plan-11616020338>, and Stuart Parker, "Conservative Group Says States' Ozone Suit 'Trojan Horse' for GHG Limits," Inside EPA, February 24, 2021 (last accessed April 8, 2021).

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to EPA's role of educating the general public. EPA is a 501(c)(3) nonprofit public policy institute dedicated to transparency in public energy and environmental policy. Due to its nonprofit mission, EPA has no commercial interest and will realize no commercial benefit from the release of the requested records.

Expedited Processing

Given the urgency of the specific facts involved here as described on pages 1-3, *supra*, including, in the event of conflicts and failure(s) to recuse, the implications thereof, and the importance of the public's need to know whether their officials are operating consistent with their ethical obligations³, EPA requests expedited processing. To facilitate this request, we request that the FOIA office use the email Enterprise Records and Document Management System (eERDMS) to search and process this request.

Expedited processing of requests requires a "compelling need", a need that can be demonstrated by "[a]n urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public." 40 C.F.R. § 2.104(f)(1)(ii). The regulation requires a requester show both an "urgency to inform" and that the requester is "primarily engaged in disseminating information to the public."

As stated in the fee waiver discussion, *supra*, EPA is "primarily engaged in disseminating information to the public." EPA regularly disseminates records obtained on social media and its website and records obtained by EPA have provided essential background for work produced by a newspaper of record and energy industry publications.⁴ Finally, EPA has received prior recognition as a media requester for FOIA purposes.⁵

There is an "urgency to inform" the public of the information requested as it relates to potential conflicts of interest of a senior USEPA official concerning matters that may fundamentally reshape the American economy. USEPA generally, and the Office of Air and Radiation, specifically, will be primarily responsible for ensuring the Biden Administration's Earth Day announcement of a promised fifty percent reduction in carbon emissions in a decade is met. Conflicts of interest within USEPA are therefore a matter of which there is an "urgency to inform".

Finally, we reiterate, prompted by a past experience of USEPA ignoring 40 C.F.R. § 2.104(f)(ii), in favor of acknowledging only (f)(i), that (i) and (ii) are phrased in the alternative -- (i) *or* (ii), that we invoke 40 C.F.R. § 2.104(f)(ii).

³ See, e.g., <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>.

⁴ See footnote 4

⁵ See, e.g., Securities & Exchange Commission Request No. 21-00769-FOIA; Department of the Interior Request No. DOI-OS-2021-003335.

Conclusion

For all of the foregoing reasons, EPA qualifies for expedited processing and a full fee waiver. We hope that the Agency will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at the below email address. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,
Neal Cornett
Attorney at Law
ncornettlaw@gmail.com